RAJESHKANNA MARIMUTHU

v.

TUAN HJ ABD WAHAB HJ KASSIM

HIGH COURT MALAYA, JOHOR BAHRU
KP GENGADHARAN NAIR JC
[CRIMINAL APPLICATION NO: MT(3) 44-06-2003]
21 NOVEMBER 2003

CRIMINAL PROCEDURE: *Habeas corpus - Detention of applicant under s. 39B Dangerous Drugs Act 1952 - Conditions of detention - Whether applicant unlawfully detained - Whether writ of habeas corpus available - Federal Constitution, art. 5 (1), (2) - Criminal Procedure Code, s. 365*

ADMINISTRATIVE LAW: *Exercise of administrative powers - Judicial review - Habeas corpus - Detention of applicant under s. 39B Dangerous Drugs Act 1952 - Conditions of detention - Whether applicant unlawfully detained - Whether writ of habeas corpus available - Federal Constitution, art. 5 (1), (2) - Criminal Procedure Code, s. 365*

CONSTITUTIONAL LAW: *Fundamental liberties - Detention - Habeas corpus - Detention of applicant under s. 39B Dangerous Drugs Act 1952 - Conditions of detention - Whether applicant unlawfully detained - Whether writ of habeas corpus available - Federal Constitution, art. 5(1), (2) - Criminal Procedure Code, s. 365*

WORDS & PHRASES: *"improperly detained" - Criminal Procedure Code, s. 365*

This was an application by the applicant for a writ of *habeas corpus* pursuant to art. 5(1) and (2) of the Federal Constitution ('FC') and s. 365 of the Criminal Procedure Code ('CPC'), on the ground that the conditions of his detention in prison were inhumane thereby rendering his detention unlawful. The applicant, who was detained on two warrants of remand in respect of two charges under s. 39B of the Dangerous Drugs Act 1952, submitted that the conditions under which he was being detained would fall within the phrase "improperly detained" in s. 365 of the CPC. The respondent, however, contended that the phrase "improperly detained" in s. 365 of the CPC could only be interpreted to refer to the legality of the detention order and not the place or condition of the detention. The respondent further averred that a person could not be set at liberty if he was being detained by virtue of an order issued by a court of competent jurisdiction and that, consequently, the detention of such a person was valid as long as the order remained valid.

Held:

[1] There are two distinct and separate parts to every prisoner's detention *ie,* the order by a court to detain and then the physical detention itself in an authorised place. A lawful detention that commences as a perfectly legal detention can become unlawful if the detention is carried out "improperly". Thus, if the lawful detention is carried out in breach of any fundamental rule or regulation pertaining to the condition of detention, then the detention itself becomes unlawful and improper and may attract the interference of the High Court on an application for a writ of *habeas corpus.* (p 339 a-b)

[2] If a prisoner is subjected, in prison, to unnecessary cruel treatment, torture or unlawful punishment, that prisoner must be able to come to the High Court and move the court to order the prison authorities or persons responsible to cease such treatment. If he is still subjected to such treatment despite a court order to desist, then in such a case, the scope of the writ of *habeas corpus* ought to be wide enough to include the setting at liberty of that person. The courts have a responsibility to ensure that the prisoner that is sent to prison to be lawfully held is not improperly treated. (p 341 e-h)

[3] Be that as it may, the applicant in the present application had not shown that his detention was improper in that the conditions of detention that he complained of were in violation of any existing prison rules or the Regulations so as to make his detention improper, and thereby, unlawful under art. 5(2) of the FC. The applicant's remedies, if any, to improve the conditions of detention or to enforce any existing right, lay elsewhere or in some other proceedings, and not by way of an application for a writ of *habeas corpus* to be let at liberty. (p 342 a-b)

[Application dismissed.]

Case(s) referred to:

Lau Lek Eng v. Minister of Home Affairs [1972] 1 LNS ***(refd)***

Madjai Sanusi v. Pengarah Imigresen Johor [1999] 7 CLJ 569 HC ***(refd)***

Morgan Perumal v. Ketua Inspektor Hussein [1996] 3 CLJ 600 HC ***(refd)***

Regina v. Deputy Government of Parkhurst Prison, ex p Hague [1992] 1 AC 58 ***(refd)***

Sunil Batra v. Delhi Administration [1978] Cri LJ 1741 ***(foll)***

Wasudeo Sohoni [1948] Nag 488 ***(refd)***

Yeap Hock Seng v. Minister of Home Affairs [1975] 2 MLJ 279 ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 365(a)(ii)
Dangerous Drugs Act 1952, s. 39(B)
Federal Constitution, arts. 5(1), (2)
Prisons Regulations 2000, regs. 3(1)(c), 55, 174

Other source(s) referred to:
Ratanlal & Dhirajlal, *The Criminal Procedure Code*, 9th edn, p 445

For the applicant - Gobind Singh Deo (Zamri Idrus); M/s Karpal Singh & Co
For the respondent - Mohamad Abazafree Mohd Abas SFC (Masri Daud)

Reported by Suresh Nathan

JUDGMENT

KP Gengadharan Nair JC:

This is an application by Rajeshkanna a/l Marimuthu (the applicant) for a writ of *habeas corpus* pursuant to art. 5(1) and 5(2) of the Federal Constitution and s. 365 of the Criminal Procedure Code (Act 593)

The applicant is presently being detained in the prison in Jalan Ayer Molek, Johor Bahru on two warrants of remand in respect of two charges under s. 39(B) of the Dangerous Drugs Act 1952. Both charges are in respect of a capital offence and are non-bailable.

The application is based on the conditions of the detention in the said prison.

The Federal Constitution provides in arts. 5(1) & (2) as follows:

> 5(1) No person shall be deprived of his life or personal liberty save in accordance with law.
>
> 5(2) Where complaint is made to a High Court or any judge there of that a person is being unlawfully detained the court shall inquire into the complaint and, unless satisfied that the detention is lawful, shall order him to be produced before the court and release him.

This provision encapsulates the fundamental right to personal liberty and consequently against being detained unlawfully. Section 365 of the Criminal Procedure Code (CPC) sets out the power of the High Court to issue an order, *inter alia*, of the nature of *habeas corpus*. It reads as follows:

> The High Court may whenever it thinks fit direct:
>
> (a) that any person who:
>
> (i) is detained in any prison within the limits of Malaysia on a warrant of extradition whether under the Extradition Act 1992 (Act 479); or

(ii) is alleged to be illegally or improperly detained in public or private custody within the limits of Malaysia, be set at liberty;

(b) that any defendant in custody under a writ of attachment be brought before the Court to be dealt with according to law.

The applicant's complaints prompting him to seek the reliefs prayed for pursuant to s. 365(a)(ii) of the CPC are contained in his affidavit affirmed on 24 May 2003 (encl. 2A). For a better understanding of the application I would like to set out the relevant paragraphs which state as follows:

– Para 8: Saya sesungguhnya menyatakan bahawa sesudah saya sampai di Penjara Johor Bahru, Jalan Ayer Molek sehingga sekarang saya telahpun di tahan di bawah keadaan-keadaan tahanan yang tidak berperikemanusiaan yang saya percaya, bertentangan dengan undang-undang.

– Para 9: Saya di tahan di dalam sebuah bilik seluas 8 kaki dan 6 kaki untuk lebih kurang 23 jam sehari.

– Para 10: Bilik ini di kongsi dengan 3 banduan lain.

– Para 11: Bilik ini adalah sebuah bilik tutup iaitu berpintu plet besi dan oleh yang sedemikian, tidak banyak ventilasi (ventilation) di dalam bilik tersebut.

– Para 12: Saya bersama-sama dengan kebanyakan banduan-banduan dan tahanan-tahanan lain di Penjara Johor Bahru, Jalan Ayer Molek yang terpaksa melalui keadaan-keadaan yang sama, hanya di benarkan keluar daripada lokap tersebut selama 15 minit untuk makan dan 15 minit untuk mandi sehari.

– Para 13: Pada setiap masa yang lain kami di kunci di dalam lokap tersebut.

– Para 14: Keadaan di dalam lokap tersebut juga amat sesak dan sehingga baru-baru ini, tiada bekalan air yang mencukupi di dalam lokap-lokap tersebut.

– Para 15: Ini amat merumitkan kerana lokap itu mempunyai kawasan tandas di dalamnya dan kami selokap di perlukan untuk buang air kecil dan besar di situ. Dengan tiada bekalan air yang mencukupi, maka keadaan di situ amat teruk sekali.

– Para 16: Saya sesungguhnya menyatakan bahawa keadaan kesihatan saya dan ramai banduan-banduan dan tahanan memang merosot, dengan penyakit -penyakit kulit dan batuk berleluasa di antara kami. Terdapat banyak banduan-banduan yang mengalami penyakit tubercolisis di dalam penjara tersebut. Keadaan-keadaan tahanan meningkatkan kebarangkalian wabak penyakit dalam penjara.

– Para 17: Saya sesungguhnya menyatakan bahawa walaupun saya di tahan reman, saya adalah seorang manusia dan saya mempunyai hak-hak asasi yang mesti di berikan kepada saya, walaupun saya di penjarakan.

– Para 18: Saya sesungguhnya menyatakan bahawa saya mempunyai hak untuk hidup di dalam keadaan-keadaan yang munasabah walaupun saya dipenjarakan.

– Para 19: Saya percaya bahawa keadaan-keadaan tahanan saya memang melangar undang-undang dan Perlembagan Persekutuan dengan jelas memperuntukkan bahawa sekiranya tahanan saya tidak mengikut undang-undang maka Mahkamah Yang Mulia ini mempunyai kuasa untuk melepaskan saya daripada tahanan di bawah responden di sini.

– Para 20: Saya sesungguhnya menyatakan bahawa saya di fahamkan bahawa Penjara Johor Bahru, Jalan Ayer Molek hanya mampu menerima seramai 1200 orang tahanan dan banduan di Penjara tersebut.

– Para 21: Pada 19.4.2003, saya bersama-sama ramai lagi tahanan-tahanan dan banduan-banduan telahpun mengadakan mogok lapar sebagai tanda ketidakpuasan kami dengan keadaan-keadaan tahanan kami.

– Para 22: Mogok ini telahpun membawa kepada pegawai-pegawai atasan Penjara Malaysia di Kuala Lumpur hadir di Penjara Johor Bahru, Jalan Ayer Molek untuk melihat secara sendiri keadaan-keadaan tahanan kami.

– Para 23: Saya sesungguhnya menyatakan bahawa mereka telahpun berjanji untuk membaiki keadaan khasnya menamatkan tahanan kami di lokap selama hampir 23 jam sehari tetapi sehingga hari ini, tiada sebarang tindakan di ambil oleh sesiapa jua dan keadaan saya dan tahanan-tahanan dan banduan-banduan lain makin merosot.

– Para 24: Saya sesungguhnya menyatakan bahawa saya makin hilang siuman dalam keadaan-keadaan tahanan ini yang amat teruk sekali yang tidak berperikemanusiaan, amat merendahkan (degrading) dan zalim.

– Para 25: Saya juga menyatakan bahawa keadaan ini juga mempunyai kesan yang amat besar kepada semua tahanan dan banduan di Penjara Johor Bahru dan keadaan di Penjara tersebut bagaikan mereka.

– Para 26: Saya sesungguhnya percaya bahawa tahanan saya oleh responden, di dalam keadaan-keadaan sepertimana dinyatakan tidak sah sama sekali.

The respondent in his affidavit in reply (encl. 5) states, *inter alia*, as follows in the relevant paragraphs:

– Para 4: Pemohon telah diterima masuk ke Penjara Johor Bahru sejak 5.10.2000 pada awalnya berdasarkan dua Waran Menahan yang dikeluarkan oleh Mahkamah Sesyen Johor Bahru yang dikeluarkan pada 5.10.2000 setiapnya. Sesalinan kedua-dua waran bernombor 010410 dan 010407 dilampirkan dan ditanda sebagai "AWK-1" dan "AWK-2" setiapnya. Pada ketika Pemohon ini sedang ditahan berdasarkan dua Waran Meletakkan Dalam Jagaan Sementara Menanti Perbicaraan yang dikeluarkan oleh Mahkamah

Sesyen Johor Bahru di dalam kes jenayah bernombor 62-234-2000 dan 62-235-2000 setiapnya yang dikeluarkan pada 6.8.2001. Kedua-dua waran adalah bagi perbicaraan ke atas Pemohon yang dituduh di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya, 1952 dan ianya telah ditetapkan pada 7 hingga 11.7.2003 bagi kes pertama dan pada 26.1.2004 hingga 30.1.2004 bagi kes kedua. Salinan kedua-dua waran tersebut adalah di lampirkan dan ditanda sebagai "AWK-3" dan "AWK-4" setiapnya".

– Para 5: Pada 27.6.2002, Pemohon bersama-sama lebih kurang 440 banduan yang lain telah dipindahkan secara sementara ke Penjara Simpang Renggam kerana kerja-kerja pembaikan yang perlu dijalankan ke atas Penjara Johor Bahru. Selepas kerja-kerja pembaikan selesai, pada 14.3.2003, Pemohon bersama-sama dengan banduan-banduan yang lain telah dipindahkan kembali ke Penjara Johor Bahru.

– Para 6: Pemohon sebagai seorang banduan reman, sejak dari 14.3.2002 hingga kini di tahan di Bilik 35, Blok A, Line B. Bilik tersebut berukuran 3.4 meter panjang dan 1.6 meter lebar dan ia turut dikongsi oleh 3 banduan yang lain.

(The "3 banduan" was deleted and substituted with "1 banduan" at the hearing).

– Para 7: Pintu bilik ini adalah berplet-kan besi dan mempunyai 2 ruang udara bersaiz 5 cm lebar dan 31 cm panjang setiapnya. Pintu bilik ini di buat sebegitu atas faktor-faktor keselamatan memandangkan Pemohon sedang di tahan reman di atas kes yang melibatkan hukuman mati. Di samping itu, di dalam bilik tersebut juga terdapat ruang pengaliran udara melalui tingkap bersegi enam di sebelah belakang berukuran lebih kurang 0.6 meter lebar dan 0.71 meter panjang.

– Para 8: Di dalam bilik tersebut turut di sediakan bekas air yang boleh mengisi sebanyak lebih kurang 18 liter yang diisi 3 kali sehari. Air tersebut hanyalah untuk kegunaan tandas. Manakala bagi tujuan mandi dan membasuh pakaian, tempat khas di sediakan di luar bilik manakala bagi tujuan minuman, air masak di sediakan kepada Pemohon sebanyak 3 kali sehari.

– Para 9: Aktiviti harian penahanan Pemohon bagi setiap hari adalah berdasarkan kepada Jadual Aktiviti Blok A/A1/B1, Permohon akan berada di luar biliknya sekurang-kurangnya 4 jam sehari. Ia termasuk waktu mandi sebanyak 2 kali, makan sebanyak 3 kali dan aktiviti-aktiviti yang lain seperti menonton televisyen, senaman, perpustakaan, aktiviti keagamaan dan "indoor-games".

– Para 10: Merujuk kepada perenggan-perenggan 8, 17, 18, 19, dan 26 Afidavit Pemohon, saya sesungguhnya menafikan pengataan di dalamnya dan menyatakan bahawa hak-hak asasi Pemohon sebagai seorang banduan telah di berikan dan ianya tidak bertentangan dengan undang-undang.

– Para 11: Merujuk kepada perenggan-perenggan 11, 12, 13, 14 dan 15 Afidavit Pemohon, saya sesungguhnya menafikan pengataan-pengataan di dalamnya dan selanjutnya mengulangi penyataan-penyataan saya di perenggan-perenggan 7 hingga 9 di atas. Saya juga secara khusus menafikan pengataan Pemohon bahawa bekalan air yang di sediakan tidak mencukupi. Saya menyatakan bahawa pada setiap hari bilik Pemohon akan mendapat bekalan air sekurang-kurangnya 54 liter air hanya untuk kegunaan tandas.

– Para 12: Selain dari itu, pengataan Pemohon bahawa beliau di kunci di dalam lokap dan di tahan selama 23 jam adalah tidak berasas. Ini kerana selain daripada aktiviti-aktiviti harian yang telah saya nyatakan di perengan 9, Pemohon sebagai banduan reman juga turut di wajibkan bekerja untuk tujuan kebersihan kawasan penempatan sekali setiap 2 minggu. Ini bermaksud, Pemohon akan berada di luar bilik untuk menjalankan kerja-kerja seperti membersih kawasan dan menguruskan pembahagian catuan makanan dan minuman kepada banduan-banduan lain di blok yang sama. Selepas waktu kerja tersebut, Pemohon di benarkan berada di luar blok untuk berehat sehinggalah waktu petang.

– Para 13: Merujuk kepada perenggan 16 Afidavit Pemohon, saya sesungguhnya menafikan pengataan di dalamnya. Saya menyatakan bahawa walaupun terdapat banduan yang berpenyakit, ia tidaklah di sebabkan oleh keadaan di dalam penjara. Di dalam setiap keadaan, sekiranya terdapat banduan yang sakit, beliau akan di rujuk kepada Pembantu Perubatan Penjara Johor Bahru atau ke hospital dan Pemohon sepanjang penahanan beliau telah dirujuk ke Pembantu Perubatan Penjara Johor Bahru atau ke hospital sebanyak lebih kurang 18 kali dan yang terbaru pada 27.5.2003 Pemohon telah dirujuk ke Hospital Sultanah Aminah, Johor Bahru. Selain dari itu, mana-mana banduan yang di sahkan sakit akan di asingkan dan di tempatkan di rumah sakit dan bukan di dalam blok penjara.

– Para 14: Merujuk kepada perenggan 20 Afidavit Pemohon, saya bersetuju bahawa terdapat waktu-waktu tertentu di penjara menempatkan lebih dari 1200 orang banduan yang melebihi kapasiti muatan selesa Penjara Johor Bahru. Namun sekiranya ia, berlaku, pihak Penjara Johor Bahru telah mengambil tindakan-tindakan segera seperti memindahkan banduan-banduan ke penjara-penjara berdekatan untuk mengurangkan kesesakan. Selanjutnya saya menyatakan bahawa di dalam setiap masa Pemohon hanyalah di tahan di bilik bersama 3 banduan lain dan ini dikategorikan sebagai selesa.

– Para 15: Merujuk kepada perenggan 21, 22 dan 23, saya sesungguhnya menyatakan bahawa terdapat segelintir banduan termasuk Pemohon mengadakan bantahan kepada pihak penjara pada 19.4.2003. Ia bukanlah merupakan mogok lapar kerana hanya makanan tengahari dan malam yang disediakan oleh pihak penjara tidak di makan sebaliknya minum pagi dan minuman petang serta makanan-makanan yang dibekalkan sewaktu sessi

bertemu keluarga dan makanan yang di beli daripada kantin di ambil oleh banduan-banduan terbabit. Saya selanjutnya menafikan pengataan Pemohon terdapat pegawai-pegawai atasan Penjara Malaysia telah hadir berjumpa dengan banduan-banduan tersebut dan berjanji untuk membaiki keadaan penjara.

At the commencement of the hearing of the application the senior federal counsel for the respondent raised a preliminary objection that a writ of *habeas corpus* could not be applied for based on the conditions of detention in the prison pointing out that the affidavits of the applicant rely on the conditions of detention. The learned counsel for applicant argued that the contention of the applicant was that the conditions of the detention made it an improper detention and that, consequently, an application could be made under s. 365 of the CPC. I held that the application will have to be heard on the merits of the case to determine whether the conditions of detention complained of in this case could make the detention "improper" in law where upon the parties sought a short adjournment stating that they would be able to agree on certain facts and will argue the case based on those facts.

After a short adjournment the parties reported that the agreed facts arise from the following paragraphs of encl. 5 – (respondent's affidavit) and are as follows:

1) Paragraph 4 – ie, that the applicant was first remanded on 5 October 2000 on warrants issued by the Sessions Court, Johor Bahru and then subsequently and currently on warrants issued by the Sessions Court on 6 August 2001 pending the hearing by of the two cases in respect of charges under s. 39B(1)(a) of the Dangerous Drugs Act 1952.

2) Para 6 – as to the size of the cell (3.4 by 1.6 meters) and that there are only two persons to a cell.

3) Para 7 – as to the description of the make up of the cell ie, the door is made of iron and has two openings which are 5 cm by 31 cm each. There is a hexagon shaped window measuring 0.6 by 0.71 meters of the back of the cell.

4) Para 9 – that ordinarily the applicant is kept in the cell for a period of 22 hours a day and only allowed out of the cell twice a day to shower or bathe and three times a day for meals.

There is no dispute between the parties that the warrants issued by the Sessions Court to detain the applicant pending the hearing of the cases against him are perfectly legal and lawful. However, Mr. Gobind Singh Deo, learned counsel for the Applicant, submitted that the conditions under which the Applicant is being thus detained would come within the phrase "improperly detained" in

s. 365 of the CPC. He referred to the book entitled *"The Criminal Procedure Code, Ninth Edition"* by Ratanlal & Dhirajlal wherein the learned authors refer to the case of *Wasudeo Sohoni* [1948] Nag. 488 (at p. 445) and state that "the expression improperly refers to cases in which although the forms of law have been observed there has been fraud on an Act or an abuse of the powers given by the legislature".

The Federal Constitution, in art. 5, refers to a person being "unlawfully detained" whereas s. 365 of the CPC refers to a person being "illegally or improperly" detained. The term "unlawful" is, in my view, wide enough to cover both "illegal" and "improper". Thus, whilst a detention may be "legal" it could become an "improper" detention if some material fundamental term and condition or regulation or rule governing the detention is breached or violated thereby leading to an abuse of the detention.

In this regard I asked both the learned senior federal counsel and the learned counsel for the applicant whether there are any terms and conditions or regulations or rules in force that set out the terms and conditions under which both convicted and un-convicted prisoners are to be confined. I was told that there are only the Prisons Regulations 2000 (the Regulations) made under the Prison Act 1995. At my request I was sent, after the hearing, a copy.

The Regulations contain about two hundred and eighty regulations but none prescribes the minimum size of the cells or the maximum number of prisoners in each cell or the maximum number of hours a prisoner could be kept locked up in a cell each day. There are also some special terms & conditions applicable to unconvicted prisoners. These are mainly in respect of food, clothing, bedding, employment, visitation rights, etc.

Learned counsel for the applicant referred to reg. 3(1)(c) of the Regulations that states:

> At all times the treatment of prisoners shall be such as to encourage their self-respect and a sense of personal responsibility, so as to rebuild their morale, to inculcate in them habits of good citizenship and hard work, to encourage them to lead a good and useful life on discharge and to fit them to do so.

and then proceeded to 'paint' a dismal picture of the cell in which the applicant, together another prisoner, is being held for about 20 to 22 hours a day. The size of the cell is 3.4 meters by 1.6 meters which is about 12 feet by 5 feet. The cell's iron door has 2 rectangular openings and through this the applicant can only just see the outside portion in front of the door. There is a small hexagon shaped window at the back of the cell on the top of the cell to let in some air. The toilet is inside the cell and thus all the calls of nature have to

be made within the cell. This makes the cell's living space even smaller. Within such a space and for such long hours the applicant (who has not been convicted of any crime) is confined for an indefinite period of time awaiting trial. He submitted that this is inhuman, cruel and degrading treatment and questioned whether such a condition will satisfy the object stated in reg. 3(c) of the regulations ie, do these conditions improve the morale of the prisoner or does it have the opposite effect. He argued that the conditions appear to be designed to break the prisoner's morale and should not be the conditions under which a person who has not been convicted of any crime should live.

I note that the general principles of prison administration as stated in reg. 3 of the Regulations include that "discipline and order shall be maintained with fairness but firmness and with no more restriction than is required for safe custody and to ensure a well-ordered community life" and that "in the control of prisoners, prison officers shall seek to influence them through their own example and leadership, and to enlist their willing cooperation"

Further reg. 55 spells out the duty of prison officers as follows:

> It is the duty of all prison officers to treat all Prisoners with kindness and humanity, to listen patiently to and report their complaints or grievances, at the same time to be firm in maintaining order and discipline and enforcing the provisions of the Act, these Regulations and Director General's Standing Orders.

The senior federal counsel for the respondent submitted that the phrase "improperly detained" in s. 365 of the Criminal Procedure Code could only be interpreted to refer to the legality of the detention order and not the place or condition of the detention. He referred to the case of *Yeap Hock Seng @ Ah Seng v. Minister of Home Affairs* [1975] 2 MLJ 279 in which Abdoolcader J (as he then was) stated that:

> *Habeas corpus* is a high prerogative writ of summary character for the enforcement of this cherished civil right of personally liberty and entitles the subject of detention to a judicial determination that the administrative order adduced as warrant for the detention is legally valid, in the sense that it is pursuant to valid statutory authority, and to test whether the detention proceedings are, in the words of Frankfurter j in *Estep v. United States* [1946] 327 US 114 a mere sham nothing but an empty form.

It was further submitted on behalf of the respondent that a person cannot be set at liberty if he is being detained by virtue of an order issued by a court of competent jurisdiction and that consequently as long as the order remained valid the detention of such a person in valid.

In *Madjai Sanusi v. Pengarah Imigresen Johor* [1999] 7 CLJ 569 Abdul Malik J, stated as follows:

> The Applicant was detained in custody under a warrant of remand lawfully passed by the Magistrate, a court of competent jurisdiction. As such, he could not be said to be illegally or improperly detained.

In *Lau Lek Eng v. Minister of Home Affairs* [1972] 1 LNS, Wee Chong Chin CJ stated as follows:

> The other grounds relied on by the applicants in support of their application for *habeas corpus* relate to the manner and conditions of their detention and not the legality of their detention under the act. In my judgment, on those grounds, *habeas corpus* is not an available remedy and I would dismiss the application with costs.

This also found favour with Abdul Malik Ishak J in *Morgan a/l Perumal v. Ketua Inspektor Hussein* [1996] 3 CLJ 600, as follows:

> I cannot help but observe that there were allegations by the application in enclosure 20 in regard to the manner and conditions of detention which he had to undergo. But unfortunately these are not matters within the scope of cases where habeas would normally issue.

In *Regina v. Deputy Government of Parkhurst Prison, Ex-Parte Hague* 1992 1 AC 58 it was held, *inter alia* as follows:

> That although, where the conditions of detention of a prisoner were such as to be intolerable an otherwise lawful detention was not rendered unlawful, such conditions might give rise to public law remedy and, where prisoner suffered injury to health, a remedy in private law as well; such a remedy would lie in negligence rather than in false imprisonment.

The learned senior federal counsel drew my attention to reg. 174 of the Regulations which states that "An unconvicted prisoner charged with a capital offence will be kept under special observation at all times" and submitted that this was one of the conditions permitted by law and a requirement of the regulations. This, to my mind, does not necessarily mean that to be under "special observation" the prisoner must be kept locked up for about 20 to 22 hours a day. He can be specially observed even if he is outside the cell but within a confined open space or even within the cell block where he can be seen (observed) by the prison watch guards on duty.

In my view there are two distinct and separate parts to every prisoner's detention ie, the order by a court to detain and then the physical detention itself in an authorized place. I am of the humble view that a lawful detention that commences as a perfectly legal detention can become unlawful if the lawful detention is carried out "improperly". Thus, if the lawful detention is carried out in breach of any fundamental rules or regulations pertaining to condition of detention then the detention itself becomes unlawful and improper and may attract the interference of the High Court on an application for a writ of *habeas corpus*.

Krishna Iyer J speaking for the Supreme Court of India in *Sunil Batra v. Delhi Administration* [1978] Cri LJ 1741, an appeal arising from an application for *habeas corpus*, posed a question as follows:

> Does a prison setting, *ipso facto*, outlaw the rule of law, lock out the judicial process from the jail gates and declare a long holiday for human rights of convicts in confinement, and (to change the metaphor) if there is no total eclipse, what a luscent segment is open for judicial justice?

The judgment in that case, examined at some great length the issues of prison conditions and the rights of prisoners. I quote below some extracts of the judgment which best amplifies the situation.

> Two petitioners – Batra and Sobraj – one Indian and the other French, one under death sentence and the other facing grave charges, share in two different shapes, the slings and arrows of incarceratory fortune, but instead of submitting to what they describe as shocking jail injustice, challenge, by separate writ petitions, such traumatic treatment as illegal. The soul of these twin litigations is the question, in spiritual terms, whether the prison system has a conscience in constitutional terms, whether a prisoner, *ipso facto*, forfeits personhood to become a rightless slave of the State and in cultural terms, whether man-management of prison society can operate its arts by 'zoological' strategies. The grievance of Batra, sentenced to death by the Delhi Sessions Court, is against *de facto* solitary confinement, pending his appeal, without de jury sanction. And the complaint of Sobraj is against the distressing disablement, by bar fetters, of men behind bars especially of undertrails, and that for unlimited duration, on the *ipse dixit* of the prison 'brass'. The petitioners seek to use the rule of law to force open the iron gates of Tihar Jail where they are now lodge, and the Prison Administration resists judicial action, in intra-mural matters as forbidden ground, relying on ss. 30 and 56 of Prison Act, 1894 (the Act, hereafter).

The jurisdictional reach and range of this Court's writ to hold prison caprice and cruelty in constitutional leash is incontestable, but teasing intrusions into administrative discreation is legal anathema, absent breaches of constitutional rights or prescribed procedures. Prisoners have enforceable liberties devalued maybe but no demonetized; and under our basic scheme, Prison Power must bow before Judge Power if fundamental freedoms are in jeopardy.

In *Coffin v. Reichard*, Substantive Criminal Law, p 14 the court was persuaded to intervene when, while lawfully in custody a prisoner is deprived of some right, the loss of which makes his imprisonment more burdensome than the law permits.

> When a man possesses a substantial right, the Courts will be diligent in finding a way to protect it. The fact that a person is legally in prison does not prevent the use of *habeas corpus* to protect his other inherent rights.

In *John v. Dys*, the Court again held it preferable "that a potentially dangerous individual be set free than the least degree of and impairment of an individual's basic constitutional rights be permitted. Thus, the constitutionality of imprisonment, its duration, and conditions can be validly tested by means of *habeas corpus*.

The harshest blow to the old "hands-off" doctrines was struck by *Monroe v. Pape* [1961] 365 US 167, 5 L Ed 2d 492.

Where the court insisted on "civilized standards of human decency" and interdicted the subhuman condition which could only serve to destroy completely the sprint and undermine the sanity of the prisoner.

I may now crystallize this legal discussion. Diciplinary autonomy, in the hands of mayhem-happy jail staffers, may harry human rights and the wails from behind the high walls will not easily break through the sound-proof, night-proof barrier to awaken the Judges' writ jurisdiction. So, it follows that activist legal aid as a pipeline to carry to the court the breaches of prisoner's basic rights is a radical humanist concomitant of the rule of prison law. And in our constitutional order it is axiomatic that the prison laws do not swallow up the fundamental rights of the legally unfree, and, as sentinels on the *qui vive*, courts will guard freedom behind bars, tempered, of course, by environmental realism but intolerant of torture by executive echelons. The policy of the law and the paramountcy of the Constitution are beyond purchase by authoritarians glibly invoking 'dangerousness' of inmates and peace in prisons.

If judicial realism is not to be jettisoned, judicial activism must censor the argument of unaccountable prison autonomy.

> The essence of this class of litigation is not adjudication on particular grievances of individual prisoners but broad delivery of social justice. It goes beyond mere moral weight-lifting or case-by-case correction but transcends into forensic humanization of a harsh legal legacy which has for long hidden from judicial view. It is the necessitous task of this Court, when invited appropriately to adventure even into a fresh areas of agony and injustice and to inject humane constitutional ethic into imperial statutory survivals, especially when the (prison) executive, thirty years after Independence, defends the alleged wrong as right and the Legislatures, whose members, over the decades, are not altogether strangers to the hurtful features of jails; are perhaps pre-occupied with more popular business than concern for the detained derelicts who are a scattered, voiceless, noiseless minority.

The learned judge answered the question he posed at the beginning thus:

> So long as constitutional guarantees are non-negotiable, human rights, entrenched in the National Charter shall not be held hostages by Authority. Emergency, exigency, dangerousness, discipline, security and autonomy are theoretically palatable expressions but, in the world where prison houses are laboratories of torture or warehouses where human commodities are sadistically kept and the spectrum of inmates range from drift-wood juveniles to heroic dissenters, courts – and other constitutional instrumentalities – should not consent to make jails judge proof to tearful injustice.

A convicted prisoner is not sent to prison for punishment (excepting the death penalty or strokes of the rotan) but as a punishment. An unconvicted prisoner is sent to prison only to be held in safe custody pending the hearing of the charge against him or her and not as punishment. In either case if the prisoner is subjected, in the prison, to unnecessary cruel treatment, torture or unjust or unlawful punishment that prisoner must be able to come to the high court and move the court to order the prison authorities or persons responsible to stop that treatment. If he is still subjected to such treatment despite a court order to desist then, in such a case, the scope of the writ of *habeas corpus* ought to be wide enough to include the setting at liberty of that person. Thus, it cannot be said, in my view, in this day and age, that as long as a prisoner is in prison pursuant to a lawful order by a court of competent jurisdiction the conditions (if unlawful) under which the imprisonment is being carried out do not matter to warrant interference on an application for a writ of *habeas corpus*. In such a situation, should the judges simply fold their arms and say that nothing can be done about such conditions of imprisonment? The courts have a responsibility to ensure that the prisoner sent to the prison to be lawfully held is not improperly treated. The person who is sentenced to or remanded in prison ought to suffer such imprisonment only in accordance with the regulations failing which the imprisonment becomes improper and unlawful in that the imprisonment then will not be in accordance with law.

Be that as it may, the applicant in the present application has not shown that his detention is improper in that the conditions of detention he complains of are in violation of any existing prison rules or the regulations to make his detention improper and thereby unlawful under art. 5(2) of the Federal Constitution. The applicant's remedies, if any, to improve the conditions of detention or to enforce any existing right lie elsewhere or in some other proceedings but not by way of an application for a writ of *habeas corpus* to be let at liberty. Consequently, the application is dismissed.